Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CG Docket No. 04-208
	)	
National Association of State Utility	)	
Consumer Advocates' Petition for	)	
Declaratory Ruling Regarding Monthly		
Line items and Surcharges Imposed by		
Telecommunications Carriers		

COMMENTS OF THE UNITED STATES COMMUNICATIONS ASSOCIATION

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Pursuant to the Commission's Public Notice issued May 25, 2004, DA 04-1495, the United States Communications Association ("USCA") submits these comments on the above-entitled petition ("Petition") of the National Association of State Utility Consumer Advocates ("Petitioner"). Petitioner asks the Commission to issue a declaratory ruling prohibiting telecommunications carriers from imposing monthly line-item charges, surcharges or other fees on customers' bills, unless such charges have been expressly mandated by federal, state or local law.[1]

[1] See Petition at p.69.

INTRODUCTION

USCA is an organization formed in 1989 and comprised of tax professionals from most of the major wireline and wireless communications carriers. USCA monitors and addresses, where appropriate, tax-related developments that affect its several members. USCA has a keen interest and particular concern in preserving the right of carriers to continue recovering certain gross receipts, right-of-way and other state and local excise tax expenses, and opposes Petitioner's request that the Commission "prohibit *all* line items, surcharges and fees unless *both* recovery of the fee, and the amount of the fee carriers are entitled to assess, is *expressly mandated* by federal, state or local government."[2]

USCA recognizes the critical importance of carriers being able to surcharge certain tax expenses, whether or not "mandated" by any government body or regulatory action. USCA demonstrates in these comments both the unjustified expansiveness of Petitioner's requested relief as it affects tax related surcharges and its potential harm to both carriers and consumers across the nation. However, USCA here does not address the totality of the Petition, and its comments herein do not pertain to Petitioner's arguments regarding the effect of various Commission Orders, Guidelines and Rules on this issue.

USCA believes that Petitioner's requested relief is unwarranted as to tax related surcharges for three reasons. First, Petitioner's request for relief is stated far too broadly. Petitioner seeks to justify such undue relief by labeling *all* surcharges, by their very

[2] See Petition at p. 24.

nature, as misleading, deceptive, and unjust.[3] While Petitioner admits that it has not looked at each carrier or each carrier's fee, it nevertheless asserts that the only reasonable action the Commission can take is to prohibit *all* line item charges.[4] However, tax related surcharges are not among those line item charges specifically addressed in the Petition nor does Petitioner suggest it has any evidence that billing for these kinds of tax expenses is unfair or unreasonable, or that the billings are misleading or deceptive. In fact, the Commission, courts of law and other government agencies have long *permitted* or sanctioned the use of pass-on or surcharge mechanisms for carriers to recover expenses incurred for gross receipts, right-of-way and other state and local excise taxes certain state and local jurisdictions impose, often exclusively and discriminatorily, on members of the telecommunications industry. Yet Petitioner's broadly stated relief would unjustifiably encompass such legitimate carrier billings to recover these burdensome taxes.

Second, as it affects these tax recoveries, Petitioner does not recognize the potential harm both to the carriers *and to consumers* that would result from its requested relief. Petitioner's assurance to the Commission that carriers will not be harmed if prohibited from using line item charges to recover tax-related expenses, because they could recover them as part of their regular nationwide rates[5], contravenes the rationale for allowing many of these surcharges in the first place. Many of these surcharges have been acknowledged by the Commission, the courts and state regulatory agencies as an effective way to dissuade jurisdictions that impose such burdensome and often

[3] See Petition at p. vi.

[4] See Petition at p. 24.

[5] See Petition at p. 67.

discriminatory taxes on carriers from exporting them to consumers in other jurisdictions. Prohibiting carriers from using line item surcharges would not only encourage more state and local governments to impose such taxes, but would allow them to inappropriately shift most of the burden for them nationwide to consumers outside these jurisdictions who would be forced to pay higher rates.

Third, despite Petitioner's express representation that NASUCA is not asking the Commission to overturn prior decisions allowing carriers to recover specific assessments through line item charges,[6] its requested relief would have the unintended but adverse effect of, for example, nullifying the Commission's approval and support of the carriers' recovery through line-item surcharges of discriminatory taxes and fees from their customers located in the states and localities that impose them. The Commission, as well as state regulatory agencies, have generally not "mandated" either the extent or method of recovering these taxes, but have nevertheless consistently approved and recognized the right of carriers to recover them through line item surcharges.

ARGUMENT

THE COMMISSION SHOULD NOT PROHIBIT LINE-ITEM SURCHARGES TO RECOVER GROSS RECEIPTS, RIGHT-OF-WAY AND OTHER STATE AND LOCAL TAXES IMPOSED UPON AND PAID BY CARRIERS, WHETHER OR NOT MANDATED BY FEDERAL STATE OR LOCAL ACTION.

The Commission should be mindful of the extraordinary tax burdens borne by telecommunications carriers and their customers, and the effective role tax-related

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6 See Petition at pp.vii, 65.

surcharges have played to minimize these excessive tax burdens on most consumers. Ample documentation supports the disproportionate and often discriminatory state and local tax burden imposed upon telecommunications carriers and their customers.[7] Throughout the nation, telecommunications carriers and their customers face greater and more pervasive tax burdens than general businesses and their customers. The National Governor's Association, and the National Conference of State Legislators, among other national policy organizations, have recently issued resolutions or papers that support eliminating or reducing the excessive tax burdens imposed upon competitive telecommunications providers.[8] In the interim, one of the most effective deterrents to excessive and discriminatory telecommunications taxation has been the ability of carriers through specific line-item surcharges to limit the recovery of these tax expenses from their customers in the state or local jurisdictions that impose them. For example, once

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[7] For example, the Council On State Taxation's 2001 *State Study and Report Of Telecommunications Taxation* concluded, among other findings, that the average effective rate of state and local taxes on telecommunications services exceeded that of general business products by almost 8%. Bureau of National Affairs, Inc., Washington D.C. 20037, Special Report, Vol. 9., No. 2, February 22, 2002. Available at: http://www.bna.com/states/cost.telecom.study.pdf
A similar independent study by Ernst & Young determined that almost 40% of all telecommunications taxes are excess taxes over those imposed on general businesses. *Telecommunications Taxes: 50- State Estimates of Excess State and Local Tax Burden* (November 2001).

[8] *Telecommunications Tax Policies: Implications for the Digital Age*, Palladino and Mazer, Center for Best Practices, National Governors' Association, 444 North Capitol Street, Washington, DC 20001, 2000. Available at http://www.nga.org/center/divisions/1,1188,C_ISSUE_BRIEF^D_590,00.html. *Telecommunications Tax Reform Policy Statement*, Executive Committee Task Force on Taxation of Telecommunications and Electronic Commerce, National Conference of State Legislatures, 444 North Capitol Street, Washington, DC 20001, July 19, 2000. Available at: http://www.ncsl.org/programs/fiscal/tcresolv03.htm. *Telecommunications and the Tangle of Taxation*, Executive Committee Task Force on Taxation of Telecommunications and Electronic Commerce, National Conference of State Legislatures, 444 North Capitol Street, Washington, DC 20001, 2000. Available at: http://www.ncsl.org/programs/fiscal/tctangle.htm.

state legislators and tax administrators understood that gross receipts tax costs would be clearly identified on customer's bills and applied only to their respective residents, policy makers began taking seriously the need to reduce these taxes and more than half the number of states that impose such taxes have done so.[9] Without this ability by carriers to surcharge – requiring carriers to recover these taxes by increasing their rates generally for services - states and municipalities would have no incentive to refrain from imposing excessive telecommunications taxes because the burden for them would largely be invisible and shifted to consumers outside of their jurisdictions.

The Commission, the courts and many state and local government bodies have considered and acknowledged that tax-related surcharges are just and appropriate. The USCA will demonstrate this support and the merits of continuing to permit carriers to recover through line-item surcharges specific types of telecommunications taxes in the following paragraphs.

A. Recovery of Gross Receipts Taxes Through Line-item Surcharges is Justified Under Sound Public Policy And Has Been Approved By The Commission And The Courts.

The Commission has consistently sustained and sanctioned the practice by telecommunications companies to recoup the costs of state gross receipts taxes imposed on their interstate receipts. State regulatory agencies have similarly sanctioned these practices as to excise taxes imposed on local and intrastate receipts of carriers. Legislatures and tax administrators in some states that impose these taxes expressly or

[9] Back in 1984, twenty-five states and the District of Columbia levied gross receipts taxes on long-distance providers of telecommunications. Since that time, largely in recognition of the competitive marketplace and carriers' ability to surcharge these tax expenses, only ten states currently impose such taxes.

implicitly permit their pass-on as an expected and appropriate business practice.[10] The well established and eminently sound public policy underlying these decisions is that the burden of onerous state or local taxes targeting telecommunications services should be confined to the constituency (customers) of the jurisdiction imposing them and not be spread among all of the carrier's customers throughout the country through increased telecommunications services rates.

Since 1986, the Commission has allowed telecommunications companies to flow through utility or telecommunications taxes imposed upon interstate gross receipts to customers in the jurisdiction imposing the tax. For many years, this practice was accomplished through tariffs filed with the Commission by the various carriers. When that policy was challenged in 1988 by the State of Connecticut, the Commission determined that the tariffs were a just and reasonable method for recovering state gross receipts taxes. In *Connecticut Office of Consumer Counsel v. FCC*, 915 F. 2d (2d Cir. 1990), the Court of Appeals affirmed the Commission's decision and found the Commission's logic unassailable. The court concluded not only that allowing the surcharge was well within the Commission's broad authority, but also that the surcharge mechanism itself is "a reasonable method of preventing states from singling out telecommunications for taxation in order to transfer a portion of their tax burden to non–residents via rates for interstate telephone service . . .." The court reasoned that:

> Absent a [surcharge], a gross receipts tax is a political and financial windfall to states imposing it because a state's coffers can be filled largely at the expense of persons in

[10] See, e.g., Ala. Code §40-21-86; Del. Title 30 §5502; N.Y. Chapter 2, Laws of 1995 (removed previous express provision prohibiting surcharge of gross receipts tax)

> other states. * * * Without the [surcharge] the success of a few states in exporting their tax burden via interstate telephone rates would cause other states to impose their own gross receipts taxes in response. The result would be an upward-spiraling of interstate telephone rates to a level bearing no relation to actual costs of service. Nipping that prospect in the bud is well within the Commissions' mandate . . ..

While the Commission's recent deregulation of most interstate telecommunications services has eliminated tariffs as a mechanism for applying surcharges, it's sanction of the surcharge practice continues today under the Telecommunications Act of 1996 (the "Act"). The Commission has exercised its authority under the Act to forbear from applying the Act's rate-averaging rules (prescribing that rates for interstate telecommunications services must be no higher for customers in one state than for those in another state) to gross receipts tax surcharges, stating: "[W]e will permit carriers to recover on a deaveraged basis state-specific gross-receipts taxes applicable to interexchange services." *Policy and Rules Concerning the Interstate, Interexchange Marketplace* (August 7, 1996).

Despite Petitioner's representation to the Commission that it does not seek to overturn the Commission's prior decisions allowing carriers to recover specific costs, its dismissal of all surcharges as unjust and its demand that they all be prohibited unless mandated will effectively negate the Commission's long-standing sanction of gross receipts tax surcharges. The Commission, as well as other government and legislative bodies would no longer be able to *permit* these surcharges, but would have to *require* them. This is neither sensible nor feasible, as it would require the Commission and state regulatory agencies, not to mention the reviewing courts, to expend undue and unwarranted time and expense to analyze the justification or necessity for mandating the recovery of numerous tax expense items. Nor could anyone reasonably maintain that state and local governments that impose discriminatory gross receipts taxes would likely ever mandate that these taxes be recovered solely from consumers resident within these jurisdictions.[11] The Commission should not waver from its consistent and steadfast recognition of carriers' entitlement to recover discriminatory gross receipts taxes by line item surcharges.

Petitioner's assurances that carriers will not be harmed by, and that all consumers will benefit from, its requested relief to prohibit these tax-related surcharges, are misleading. The carriers will be harmed because their most effective shield against the unchecked proliferation of excessive and discriminatory gross receipts taxes will be removed, and they will have no option other than to increase their general rates for all consumers to recover these substantial and unfair tax costs. This is hardly a viable option in an economic environment of intense price competition not only among the carriers themselves but also between the carriers and general business companies that provide many of the same services without being subject to these telecommunications gross receipts taxes. Accordingly, the carriers will be severely hampered in their ability to compete on any semblance of a level playing field with the IP and other non-traditional service providers.

Nor will most of the consumers Petitioner purports to protect – those outside the few jurisdictions that impose gross receipts taxes - benefit from petitioner's requested

[11] For example, the Pennsylvania legislature in 2003 not only expanded the scope of its telecommunications gross receipts tax to include interstate revenues but sought in the same legislation to prohibit carriers from recovering the taxes imposed upon interstate telecommunications revenues as a separate line item on customer bills. This patently unlawful prohibition provision was actually passed by the House before the Senate shortly before enactment of the legislation finally removed it.

relief. Contrary to petitioner's assertions, it is the carriers' ability to surcharge gross receipts tax costs within the taxing jurisdictions that actually benefits and protects most consumers from inflated service rates caused by the previous exportation of these tax impositions. Prohibiting line-item surcharges will simply open the floodgates for a few states and localities to again export the burden of these discriminatory taxes on unsuspecting consumers outside these jurisdictions who derive no value from the tax dollars paid yet will have to pay higher service rates to subsidize those who do.

B. Recovery of Local Right-of-Way Taxes Through Line-item Surcharges is Equally Sound Public Policy Resulting in Overall Lower Consumer Rates.

Telecommunications carriers are often assessed franchise or right-of-way fees, as compensation for the company's use of local rights-of-way for the placement of facilities or for the privilege of providing service to customers in the locality. The requirement to pay and the amount of these fees are sometimes set forth in a state statute or local ordinance and sometimes included as part of an agreement between the local government and the telecommunications company.

These payments traditionally have been "passed through" to customers located within the local jurisdiction levying the fee, by way of a separate line-item surcharge on the bill in addition to the regular tariff (if applicable) or advertised rate charged for service. In some cases, this manner of pass-through may be mandated by statute, ordinance or tariff, or in many instances, the applicable authority may not mandate the pass-through but simply permit it.

Regardless of whether their pass-through is actually mandated in a strict legal sense, telecommunications companies should be encouraged—not discouraged or prohibited—to continue recovering these local fees in a way that limits their burden to those customers located within the jurisdiction to which they are paid. The reasons for this position are essentially the same as those explained in the previous section with respect to gross receipts taxes.

As confirmed by the Second Circuit in *Connecticut Office of Consumer Counsel* with respect to gross receipts taxes, absent a surcharge, a fee required to be paid by a telecommunications company to a local jurisdiction would be a political and financial windfall to that jurisdiction because it would provide revenues to the jurisdiction largely at the expense of persons in other jurisdictions. Recovery of these fees solely from customers located in the respective jurisdictions through surcharges acts as a disincentive to impose or increase the fees. On the other hand, as with gross receipts taxes, prohibiting line-item surcharges only encourages local jurisdictions to burden consumers located elsewhere because it would effectively require all customers to pay higher service rates.

C. Recovery of Local Excise Taxes Through Line-Item Surcharges is Sanctioned By Most State Public Utility Commissions and Represents Sound Public Policy.

Historically, state Public Utility Commissions (PUCs) have examined the local telecommunication provider's costs, and based upon an allowable rate of return, established statewide rates for the provider's individual telecommunications services. Locally imposed occupational taxes, license taxes, utility tax and other forms of taxes and fees on telecommunications companies have been excluded from the statewide costs associated with providing the service. As stated above, if the local tax and fee costs are included within the statewide rates, this will provide a means for local municipalities to export their taxes into the rates that are paid by individuals residing outside of their jurisdiction. This would motivate municipalities to compete by increasing these impositions such that more taxes and fees are exported to the rest of the state than are imported from other local taxing jurisdictions within the state. A public policy that provided this motivation should be viewed as detrimental to the general welfare of the telecommunications industry and the people it serves. Individuals would be forced to indirectly pay the taxes and fees of other jurisdictions without having a voice of the enactment or administration of such impositions.

Rather, the PUCs have stated by regulation that telecommunications providers may pass through such taxes and fees to the residents of those jurisdictions imposing the tax or fee. Thus, only the individuals who have a voice in the imposition of such taxes and fees are required to bear the consequence of their decisions. This allows the PUCs to determine statewide telecommunications rates, and the incremental costs for each jurisdiction can be added as identifiable “line-item” surcharges on the individuals residing within the jurisdiction imposing the tax or fee.

The telecommunications industry has requested that such local impositions be elective rather than being mandated by the PUCs. This has allowed small telecommunication providers that operate in single taxing jurisdictions to choose between incorporating their local taxes and fees into the PUC approved rate base, or list them as surcharges. By including the municipal taxes and fees into the rate base, these small companies have avoided the necessity to develop expensive billing systems and maintain data bases that record the individual location of each customer's telephone. Therefore, sound policy reasons have justified the PUCs allowing the telecommunications provider to determine how they recover these local taxes and fees.

Prohibition of the pass-through of these monthly line-item charges, surcharges and other fees on customer's bills, unless such charges have been expressly mandated by federal, state or local law, will require the state PUCs to reverse a well reasoned policy that has helped keep customer telephone bills at a minimum, and increase their administrative burdens without any corresponding public benefit. Proceedings to secure a "government mandate" to allow for such line-item billing would consume critical – and limited – time and resources on something that has been fairly stabilized in the world of tax liability recovery for some time.

To implement the requested declaratory ruling will also necessitate state PUCs conducting comprehensive studies of each local jurisdiction's taxes and fees to determine whether they should be mandated as a line-item on the customer's bill. Rather, it is suggested that this issue be addressed on an "exception" basis by allowing residents to object to the PUCs about incorrectly included taxes, fees and surcharges as is the current practice. It is more efficient to examine the small number of specific problems than mandate a review of the many thousands of correctly administered line items included on customer's bills.

This proposal before the FCC will result in substantial additional costs to be incurred by PUCs, the telecommunication providers, and their constituents without any documented benefit. The existing process is more efficient and better suited to address the minority of problems, if any.

CONCLUSION

For the foregoing reasons, the Commission should enter an Order denying Petitioner's requested relief that carriers be prohibited from imposing line-item surcharges to recover state and local taxes unless such charges are mandated by federal state or local law.

Respectfully submitted,

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/s/Richard P. Jankun_______

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Comments of the United States Communications Association, was served by electronic filing, the 14th day of July, 2004, on the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
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Room TW-B204
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/s/James P. Kratochvill_________